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GOODS TO BE LEFT TILL CALLED FOR.

The Queen's Bench Division of the English High Court of Justice were called upon recently to determine a question on the law of Carriers which, though not absolutely novel, is one of great practical importance to railway companies and consignees of goods. The point to which we refer was raised in the cases of *Chapman v. London and North Western Railway Company*, and *Chapman v. Great Western Railway Company*.[1] The plaintiff was a traveler in drapery goods, a package of which goods was delivered to the Great Western Railway Company at Bristol to be forwarded to their station at Wimborne. A second package was delivered to the London and North Western Railway Company to be delivered at the same place. Both were addressed to the plaintiff and directed to be left till called for. The former parcel arrived on March 24th; the latter on the 25th. They were placed in the warehouse to await the plaintiff. On the 27th, before they were called for, a fire broke out accidentally on the premises and burnt down the warehouse and consumed the plaintiff's goods. It appeared that the plaintiff had no residence or place of business near the station, and that he called on the 22d to inquire after the goods, and again on the 27th, after the fire. The question for the court was, whether the goods were to be considered as having been in the custody of the defendants as carriers, in which case the defendants would be liable for the loss, though not arising from any default of theirs; or as warehousemen, in which case they would be liable only for want of proper care, of which there was no allegation.

Generally speaking, the duty of a common carrier is to convey and deliver safely and securely, and his responsibility does not cease until the goods are delivered in the usual and ordinary course of delivery. But the responsibility of the carrier as carrier continues only as long as his control over the goods as carrier continues. So it was held in a case where a common carrier, between B and C, employed to carry goods from B to C, to be forwarded to D, carried them to C, there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them. The Court of King's Bench held that he was not answerable for the loss.[2]

If the defendants were considered merely as warehousemen there would be no pretense to say that they were liable for the accident. The case of a carrier stands upon peculiar grounds. He is responsible as an insurer for the prevention of fraud, but the keeping of goods in a warehouse is not for the convenience of the carrier, but of the owner of the goods; for, when the transit is at end, it is the interest of the carrier to get rid of them directly. The declaration in the above case stated that the defendants were common carriers of goods for hire from Stourport to Manchester; and that the plaintiff at Stourport delivered to the defendants four pockets of hops, to be by them taken care of and safely and securely carried from Stourport to Manchester, and to be forwarded from thence to Stockport for the plaintiff; that, in consideration of the premises, and also in consideration of certain hire and reward to be therefor paid to the defendants, they undertook to take care of the said hops, and safely and securely to carry them and forward the same. When the goods arrived at Manchester they were put into defendants' warehouse there, and consumed by an accidental fire before any carrier came from Stockport to whom they could be delivered. No charge was made for warehousing the goods, but the carriage was generally paid before they were delivered over to another carrier for conveyance to Stockport. Sometime before the goods in question were delivered to the dedefendants, their agent told the plaintiff that, if he would send all his goods by them, they would forward them to Stockport by the first carrier that should come there, without insisting on being paid for the carriage before they delivered them, and would settle with him when they met. A verdict was taken for the defendants with liberty to the plaintiff to

[1] 42 L. T. R. N. S. 252.

[2] Garside v. Proprietors, 4 T. R. 581.

move to set it aside and to enter a verdict for him, if the court should be of opinion that the defendants were answerable under the circumstances. In support of the application for a rule it was argued that the defendants were responsible, as it was a joint contract by them to carry the goods to Manchester and to keep them safe at that place till they could be forwarded to Stockport, and that it was for their convenience that the goods were deposited in their warehouse; but the rule was refused.

In Bourne v. Gatliffe,[3] the first count in the declaration stated the delivery to the defendants of certain goods to be carried by them in a steam-vessel from Dublin to London, and there delivered, all and every the dangers and accidents of the seas, steam navigation, and the like excepted, to the plaintiff or his assigns. The breach assigned was the non-delivery in London. The second count was on a promise, in consideration of the previous delivery to be carried to London for freight, and of the employment of the defendants by the plaintiff for other reward, to take care of the goods at the wharf where they should be landed from the steamboat, and to carry the same from the wharf to the plaintiff's place of business, and to deliver the same in a reasonable time. The non-delivery was alleged as a breach. To the first count there was a plea that the goods after arrival were placed on a wharf at which goods conveyed by steam-vessels from Dublin to London were accustomed to be deposited for the consignees, such place being fit and proper for the purpose; and that afterwards, and before a reasonable time for the delivery thereof, these goods were destroyed by an accidental fire. Another plea, viz., the fourth, stated that after the arrival of the ship and goods the defendants were ready and willing to deliver to the plaintiff or his assigns, but neither the plaintiff nor his assigns were then ready to receive the same, and that the goods were thereupon deposited on the above wharf, and that they were destroyed there by an accidental fire before the defendants had been requested to deliver the same. The Court of Common Pleas were of opinion that all the pleas in the first count were bad in substance which did not state either a delivery to the consignee or his assigns, or that a delivery to the wharf was a delivery to them according to the usage of the port of London with respect to goods on such a voyage; and, as the goods were deliverable to the plaintiff or his assigns, the defendants were not bound to deliver them until they had notice that the plaintiff or some assignee would receive, or until the party entitled should come to receive them, still the defendants were bound to keep the goods on board, or on the wharf at their own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them, and they continued liable until such reasonable time had elapsed. As a rule, then, where a carrier has been intrusted with goods to convey them from one place to another, and to be forwarded from the latter of the two places to a third place, and before thus forwarding them puts them in a warehouse where they are destroyed by fire, he will be answerable for the loss.

The authorities were fully considered by the Court of Exchequer Chamber in Great Western Railway Company v. Crouch.[4] In that case the plaintiff delivered in London to the defendants, who were common carriers, a parcel addressed to the plaintiff's agent at Plymouth. The defendants' railway terminus was at Bristol, from whence they forwarded the parcel to Plymouth by the South Devon Railway, and shortly before noon, on the day of its arrival, a porter tendered it to the plaintiff's agent, who refused to pay the sum charged for its carriage, whereupon the porter took it away, saying it would be returned to London at eight o'clock in the morning of the following day. About two hours afterwards the plaintiff's agent tendered at the office of the South Devon Railway the amount of the carriage and demanded the parcel, when he was told that it had that morning been returned to London. The parcel remained in custody of the defendants at their office in London, and it did not appear that the plaintiff had applied for it there. The jury found that the parcel was sent to London unreasonably soon; and that the demand of the parcel and tender of the charge for carriage was made within a

[3] 2 Man. & G. 643.

[4] 3 H. & M. 183.

reasonable time after the parcel had been refused. Under those circumstances it was held that the defendants were liable for a breach of duty, even supposing their duty *qua* carriers ended with the tender of the parcel.

In *re* Webb[5] A, B, C, and D, in partnership as carriers, agreed with S. & Co., of Frome, to carry goods from London to Frome, where they were to be deposited in a warehouse belonging to the partnership at Frome where A resided, without any charge for warehouse room, till it should be convenient to S. & Co. to take the goods home. Goods of S. & Co. carried by the partners from London to Frome under the agreement were deposited in the warehouse at the latter place, and destroyed by fire, The court held that the partners were not liable to S. & Co. for the value of the goods burnt, and that A having paid the amount of the loss to S. & Co., had paid it in his own wrong, and was not entitled to contribution from his partners. The ground of the decision was, that A, B, C, and D had completed their duty as carriers, the goods having arrived at the place of their destination; and that A. & Co. therefore stood only in the relation of warehousemen to S. & Co. It was argued that, if a carrier, in any intermediate stage put the goods under his care in a warehouse for his own convenience, they are in his holding as carrier as much as if his boat were moored with them on board, or his wagon in which they were landed was put upon the road; but Mr. Justice Burrough was of opinion that the duty of A. & Co. as carriers was suspended by the special contract between them and S. & Co., and that the goods were in the custody of the former under that special contract.

The Queen's Bench Division thought that neither Garside v. Trent nor Bourne v. Gatliffe was applicable, because in the present case there was no undertaking to forward the goods, nor was there any obligation to give notice of their arrival. The matter was there-

considered with reference to general

inciples proceeding from the proposition

at the contract of the carrier is not only to carry, but also to deliver, and the consequence that to a certain extent the custody of the goods as carriers must extend beyond as well as precede the period of their transit from the place of consignment to that of destination. "Just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. He can not be expected to be present to receive delivery of goods which arrive in the night time, or of which the arrival is uncertain, as of goods coming by sea or by a goods train, the time of the arrival of which is liable to delay. On the other haud, he can not, for his own convenience or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him." If the consignee does not take away the goods in a reasonable time the obligation of the carrier becomes that of an ordinary bailee. As to the words "to be left till called for," they simply amount to an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station, and after a reasonable time had passed their liability in respect of such goods was that of bailees. In the opinion of the court a reasonable time for delivery had passed before the plaintiff was ready to take the goods. Hence judgment was entered for the defendants. The court was fortified in its opinion by a reference to *re* Webb, where goods were stored for the convenience of the plaintiffs.

[5] 8 Taunt. 443.

JUDICIAL INTERFERENCE WITH LEGISLATIVE DISCRETION.

In a recent opinion in the case of *State v. City of Indianapolis*, 10 Cent. L. J. 276, the Supreme Court of Indiana, construing sec. 1, art. 10 of the Constitution of that State, with reference to an act of the legislature, exempting from taxation $500 of the property of a widow, unmarried female or female minor, whose father is deceased, where the entire estate of such person does not exceed $1,000, holds that such property must be used for "charitable purposes" to be exempt for "charitable purposes" under the section referred to. The section reads, "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, lit-

erary, scientific, religious and charitable purposes as may be specifically exempted by law."

It was not denied that the exempted classes fell within the statute of 43 Eliz. of Charitable Uses and Trusts, which is the law of Indiana by legislative act (1 G. & H. p. 162), and by decision, McCord v. Ochiltree, 8 Blfd. 30. It will be noticed the word "used" does not occur in the section quoted. Construing the revenue section of the Illinois Constitution, and reviewing and reversing the decision of the Supreme Court of that State, the Supreme Court of the United States in People v. North Western University, 99 U. S. 318, wherein the State court held that property to be exempt for school purposes must be used for school purposes, though Justice Miller said: "The first observation we have to make is that the Constitution does not say 'property used for schools,' as the opinion of the court implies. Neither the important word use or schools is found in the section of the instrument on that subject. If the language were that the legislature might 'exempt property for the use of schools,' we should readily agree with that court. Indeed that would be the appropriate language to convey the idea on which the court rests its decision. The makers of the Constitution, however, used other language because they had another meaning, and did not use that, because they did not mean that. They said that the legislature might exempt from taxation 'such property as they might deem necessary (not for the use of schools but) for school purposes.' The distinction is we think very broad between property contributing to the purpose of a school made to aid in the education of persons in that school, and that which is directly or immediately subjected to use in the school."

There is hardly a doubt but that the Supreme Court of Indiana here finds itself in conflict with the Supreme Court of the United States. And further according to that high court, it finds itself making a Constitution for the people, or at least giving an unauthorized construction to the Constitution the people have made. But it seems to us that there is still more serious objection to the opinion in *State v. City of Indianapolis*, *supra*, in the fact that in holding the exemption made by the legislature unconstitutional, the court assumes to revise the discretion of the legislature in a matter that violates well settled rules of constitutional construction. In authorizing the legislature to enact exemption laws for the various purposes enumerated in sec. 1 art. 10 before quoted, it will be observed the framers of the Constitution did not define what they meant by "municipal, religious, educational, scientific and charitable purposes," but left it to the discretion of the legislature to say what constituted those purposes. Had the definition of "charitable purposes" as expressed in this exemption law been utterly at variance with the general idea of what constituted a "charitable purpose," there is little doubt it would be the court's duty to interfere. But without pretense that there is such variance, the court sets aside legislative action, for no reason on this point that will satisfy the critical lawyer. The doctrine the court has violated is laid down by Judge Cooley with great clearness in these words, "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives." Const. Lim. 129. This rule is accepted by the court in the well-reasoned case of Walker v. City of Cincinnati, 21 Ohio St. 14; s. c. 8 Am. Rep. 24; and is supported by People v. Fisher, 24 Wend. 220; Cochran v. Van Surlay, 20 Id. 381; People v. Gallagher, 4 Mich. 244; Benson v. Mayor of Albany, 24 Barb. 252; Grant v. Courter, Id. 232; Wynehames v. People, 13 N. Y. 391. From the section of the Indiana Constitution under consideration the only restriction to be deduced as to what constitutes a "charitable purpose" is an implied restriction resting in theory only, and in setting aside this law the court is placed in the attitude of striking out the legislative theory of what constitutes a "charitable purpose" and substituting a theory of its own, in plain violation of the doctrine laid down by Judge Cooley. The court has not even indicated that the legislative theory embodied in this exemption act outrages the popular idea of what constitutes a "charitable purpose," whereas to justify its interference the court should be satisfied that the legislative action was an evasion of a constitutional restriction beyond a reasonable doubt. Cooley's Const. Lim. 128; Lehman v. McBride, 15 Ohio St. 573; C. W. R. R. v. Com. of Clinton Co., 1 Id. 77; Stewart v. Supervisors Polk Co., 1 Am. Rep. 240; Morrison v. Springer, 15 Iowa, 304; Adams v. Howe, 14 Mass. 347; Sharpless v. Mayor, etc., 21 Pa. St. 162; Thorp v. R. R., 21 Vt. 142; People v. Draper, 15 N. Y. 543; Perry v. City of Keene, 15 Am. Law Reg. One of the strongest indications of haste in the preparation of this opinion is found in the fact that the court in an effort to bring the legislature within what it conceived to be the restrictions of the Constitution, has failed to keep within the sphere allotted it by that instrument. Or as Judge Scott said in Walker v. City of Cincinnati, *supra*, "exercise a power which makes the courts sovereign over both Constitution and people, and converts the government into a judicial despotism." We think the court has encroached upon the prerogative of a co-ordinate branch of the State government in a manner that it can not justify upon principle or by authority, besides overruling the well-considered opinion, concurred in by Judges Howe and Elliott, of the Marion Superior Court, holding the law constitutional. These able and careful judges accepted the decision of Mr. Justice Miller in People v. Northwestern University, *supra*, as decisive of the constitutional question in *State v. City of Indianapolis*, while no reference whatever is made to that decision by the Indiana Supreme Court.

RESCISSION OF CONVEYANCE—FAILURE OF TITLE—LAND IN ANOTHER STATE.

WINFREY v. DRAKE.

Supreme Court of Tennessee, April Term, 1880.

Where a contract for the sale of land is executed by a deed of conveyance in which, by oversight, a material part of the land is not embraced, and the vendor has no legal title to that part, but only at most an equitable right to obtain it, the vendee is entitled to a rescission, unless the title is perfected before decree. The land lying in another State, the rescission will be upon condition that the complainant make a deed of re-conveyance, within a reasonable time, duly probated for registration according to the laws of that State.

COOPER, J., delivered the opinion of the court:

On the 27th of January, 1872, complainant and defendant entered into an agreement in writing, by which the latter agreed to sell, and the former to buy, an undivided half interest in the Ionia plantation in Desha county, State of Arkansas, consisting of 973 acres, "more or less," for $9,000, payable partly in the notes of third persons and partly in complainant's own notes. On the 7th of February, 1872, the contract was executed by the delivery of the notes on the one part, and of a deed for the land with covenant of title on the other. Shortly afterwards, one Randolph as the judgment creditor of one Johnson, a previous owner of the land, caused an execution to be issued on his judgment and levied upon part of the land sold, which part may be described in brief as s. e. quarter of sec. 20, containing about 158 44-100 acres. When this levy was made it was discovered that s. e. quarter of sec. 20 was not included in the deed of defendant to complainant, nor in the series of conveyances under which the complainant claimed, from Johnson down, each of the conveyances containing in lieu the n. e. quarter of sec. 20. On the 18th of March, 1872, the complainant gave the defendant written notice of the omission, and that, unless he made him a good and valid title to the undivided half of the said south east quarter section, he thereby tendered possession of the land, and would proceed to file a bill for rescission. Some negotiations passed between the parties during which the defendant in writing acknowledged that he understood himself as selling the quarter section in question to the complainant, and was bound to defend his title thereto. A suit was at once instituted by the defendant to enjoin the sale of the land under the Randolph execution, and to perfect his title to the land. Winfrey was at first joined as a party complainant in that suit, but after the commencement of this litigation his position was changed to that of a defendant. The present suit was commenced on the 16th of April, 1872, and was mainly based on the omission of the land from the deed. An amended bill was afterwards filed claiming a deficiency of title to some 48 acres of land in other parts of the tract, and an outstanding tax title. The defendant filed a cross-bill tendering a warranty deed for the s. e. quarter sec. 20. The cause was heard on the 1st of July, 1875, and the contract was rescinded. The defendant appealed. At that time the litigation commenced in Arkansas to perfect the title was still pending.

The law regulating the rights of a vendee of land to rescission is well settled in this State in accord with the weight of authority; and it is not shown that the law is otherwise in the State of Arkansas. If the purchaser go into possession of land under a contract executed by deed of conveyance he must rely upon the covenants of his deed, and cannot come into equity for rescission because of a defect of title, except for fraud, the vendor's insolvency or other independent equity. Buchanan v. Alwell, 8 Hum. 516; Barrett v. Clark, 5 Sneed, 435. It is otherwise when the contract is executory, in which case, even if the failure of title be for only a part, but a material part of the land, the vendee is entitled to a rescission of the entire contract. Galloway v. Bradshaw, 5 Sneed, 70; Topp v. White, 12 Heisk. 168. In the absence of fraud a vendee under an executory contract who comes into equity for rescission will be compelled to accept a title made good before final decree. Blackmore v. Shelby, 8 Hum. 439. He will not be compelled to take an after acquired title if there be fraud. Woods v. North, 6 Hum. 309. Nor a doubtful title at all. Cunningham v. Sharp, 11 Hum. 118; Mullins v. Aiken, 2 Heisk. 535; Scott v. Simpson, 11 Heisk. 310.

The contract in this case was intended to be, and if the deed had covered the entire tract, would have been executed. The s. e. quarter sec. 20 was not, however, included in the conveyance. That quarter section, the proof shows, lay in the very center of the tract, near to the improvements, and consisted principally of cleared land, as valuable as any in the tract. The witnesses agree that it was a material part of the land sold. Not having been conveyed, the rights of the parties must be governed by the contract of the 27th January, 1872. If the defendant had been clothed with a good title, and had, at the filing of the bill, tendered to the complainant a deed for the land omitted, with the covenants of the deed of the 7th of February, 1872, the complainant would have been compelled to take it. So if, as I think may be conceded, there was no fraud on the part of the vendor, and he had an equitable right to obtain the legal title, and had actually acquired it previous to the final decree below, the complainant's right to rescission might have been defeated. The defendant clearly had no title to the land; only at most, an equity to call for it. McWhirter v. Swaffer, 6 Baxter, 348. He could not, under the executory contract, compel the complainant, after the defect was discovered, to take a deed for the land to which he had no legal title. It was his misfortune that he could not perfect the title before the final decree. The right to rescission must relate to the filing of the bill. Only the perfecting of the legal title within time or a new contract, could affect that right.

The decree must be affirmed with costs, but

upon condition that the complainant within a reasonable time make a deed of re-conveyance of the land, duly probated for registration according to the laws of the State of Arkansas.

MUNICIPAL ORDINANCE — LIABILITY OF LOT OWNER FOR INJURY TO PEDESTRIAN.

CITY OF KEOKUK v. INDEPENDENT DISTRICT OF KEOKUK.

Supreme Court of Iowa, April, 1880.

A city ordinance requiring lot owners to construct and repair sidewalks, and providing that upon their failure to do so the city shall perform the work and assess the cost upon the lots, does not render a lot owner liable for injuries to a pedestrian sustained by his sidewalk being out of repair, after he has been required and notified to make the repairs.

Appeal from Lee district court.

Action at law. The petition alleges that defendant is the owner of a certain lot in the City of Keokuk; that a sidewalk along the street upon which the lot is situated became and continued for a long time out of repair, and in a dangerous condition; that one Charlotte Stanwood, while passing upon the sidewalk in the exercise of due care, incurred great bodily injuries by a fall caused by the dangerous condition of the walk, and that in an action against the city she recovered a large judgment, which, with costs, the plaintiff has paid. The petition alleges that it was the duty of defendant to keep the sidewalk adjacent to its lot in repair, and although notified of its dangerous condition failed to discharge this duty. The petition asks judgment for the amount paid by plaintiff, with interest and costs. The answer denies that defendant was charged with the duty of keeping the sidewalk in repair, and alleges that such duty rested upon plaintiff; and that the injury to Mrs. Stanwood resulted from the negligence of plaintiff in failing to repair the walk. The defendant also denies that it was notified of the dangerous condition of the sidewalk. Defendant alleges that the lot in question was owned by it for school purposes; that the property was not subjected to taxation for any purpose; and that defendant was not required to keep the sidewalk in repair. The cause was tried by the court without a jury, and judgment rendered for defendant, the court finding that plaintiff has no cause of action. Plaintiff appeals.

Anderson & Roberts, for appellant; *McCrary, Hagerman & McCrary*, for appellee.

BECK, J., delivered the opinion of the court.

The evidence introduced by plaintiff upon the trial in the court below sustains the allegations of its petition touching the condition of the sidewalk, and the action and judgment for injuries sustained by Mrs. Stanwood. It is also shown that under the ordinances of the city sidewalks are required, in certain cases, to be constructed. Notice is given the owner of lots abutting upon the street requiring him to cause such walks to be made within a time prescribed by the city council. If he fail or refuse to comply with the requirement the city shall cause the sidewalk to be constructed, and shall assess and levy a special tax upon the abutting lot for the purpose of paying the expenses of the work. In case it be necessary to make repairs of said walks like proceedings are to be had, and if they be not made by the lot owner, the work is done by the city, and the cost thereof is in a like manner assessed and levied against the lot. It is further provided that in case the lot owner neglects or refuses to make the repairs within ten days after notice is served upon him, he shall be liable to a fine of not less than $1, nor more than $20. The evidence which supports the allegations of the answer need not be here set out.

Whether a school district is liable in an action of tort for injuries sustained by reason of its negligent acts or omissions, in the view we take of the case, need not be determined. As we reach a satisfactory conclusion upon another point, which will dispose of the case, we confine our investigations and discussion thereto.

The question we propose to consider, and upon which the determination of the case turns, is this: Is defendant, without regard to its character as a school corporation, liable to plaintiff upon the facts of the case? The question as thus stated will require us to regard defendant as standing in this case in the same position, as to rights and liabilities, as a natural person. We will proceed to its consideration.

The city is charged by its charter with the duty and power to grade and construct streets and sidewalks. In the exercise thereof the ordinance under which it is claimed that defendant is liable in this action was passed. There can be no dispute upon these positions. The manner of exercising the power is left largely to the discretion of the city government. It may cause the work to be done and assess the cost thereof as a special tax upon the lots abutting the streets unimproved. It may require the lot owners to make the improvements, and in case of their default cause the work to be done and assess a special tax upon the abutting lots to pay for the improvements. The city, it is very plain, is clothed with authority to determine whether the improvements are proper and demanded by the public, and the character and extent thereof. It may order the improvements to be made, and prescribe the time and manner of their construction. When it has exercised its authority thus far it must determine another question, namely: In what manner shall the money be raised to pay for the work, or what fund shall be used for that purpose? The city may assess special taxes upon abutting lots in order to raise a special revenue to pay for the work. When this is done it is very plain that the improvements are made and paid for by the city in the exercise of its municipal authority. The owners of lots abutting upon the streets improved are charged with no duty touching the work other

than the payment of the special tax assessed upon their property. They have no other or greater responsibility as to the improvements than other tax payers. The case is simply this: The city, in the exercise of its lawful authority, causes the improvement to be made, and pays for it out of the funds raised by a special assessment upon the abutting lots; the lot owner supplies the revenue from which payment is made. It is very plain that the property holder is not liable for failure to construct or keep in repair the street or sidewalk.

In the case before us the ordinance of the city provides that the lot owner may be required to do the work. Of course upon his compliance no assessment can be made by the city. No question is raised as to the validity of this provision of the ordinance. The question next presented is this: Does the provision of the ordinance just stated impose liability upon the lot owner for injuries sustained by reason of the sidewalk not being repaired, after he has been required and notified to make the repairs. In this case the necessity for and character of the repairs and time and manner of doing the work are determined by the city. Instead of assessing the costs of the improvement upon the lot in the first instance the owner is called upon to do this work. In this case the city pursues a different manner of causing the improvement to be made. Instead of exercising its power, through officers or contractors, to employ workmen, it requires the owners to do what the officers of the city or contractors would do in other cases. Now, under what authority does the lot owner in this case make the improvement? Clearly the authority of the city. For whom is the work done? The city. The owner, then, is the agent for the city, authorized and required to make the improvement. In this case the city simply pursues a course, in causing the improvements to be made, which dispenses with taxation therefor, either general or special. It is another method of providing for the payment of the cost of the improvement. The lot owner may do the work, and thus escape taxation, or he may do the work in discharge of his liability for assessment for the cost thereof. The case may be stated in other and plainer words, namely: The city causes the work to be done, and the lot owner pays for it instead of being taxed for it. The lot owner is assessed with the work instead of being assessed with a money tax. All the differences between the cases where the lot owner does the work and where the city officers do it, are in the methods accomplishing the improvement and the manner of paying for it. All matters pertaining to the authority to make the repairs and the purposes thereof are the same in each case. In each case it is equally plain that liability for the injuries resulting from the non-performance of the work rests where the authority to do it is found, with the city. The lot owner in doing the work stands in the position of a tax payer making payment of taxes. If he refuses to do the work he simply fails to pay his taxes in a manner which the city may lawfully require, but he is not liable for injuries resulting from defective sidewalks which were not repaired, for the reason he did not pay his assessment either of labor or money. Whoever heard that a tax payer of a city would be liable for injuries resulting from the failure of the city to make improvements, because the property owner refused to pay his taxes and thus supply revenue, without which the city was not able to do the work?

The ordinance of the city provides that in case the lot owner fails or refuses to make repairs of sidewalks required he is liable to a fine. Without stopping to inquire into the validity of this provision we may say that it is but a method of enforcing the performance of the work which, we have seen, is in lieu of the taxes. It imposes no liability upon the lot owner for injuries resulting because the work is not done, which, as we have seen, rests only where the authority to order the work is found. Our conclusions, as above expressed, are sustained by the following authorities: Kirby v. Boylston Market Co. 14 Gray, 249; Flynn v. Canton Co. 40 Md. 312; s. c. 17 Am. Rep. 603; Heeney v. Sprague, 11 R. I. 456; Eustace v. Johns, 38 Col. 3; Jansen v. Atchinson, 16 Kan. 358.

The cases cited by counsel for plaintiff are based upon the negligence of the lot owner in using the sidewalk, or in permitting obstruction thereon, or upon an obligation by contract or otherwise resting upon him to keep the highway in repair. See Rowell v. Williams, 29 Iowa, 210; Ottumwa v. Parks, 43 Iowa. 119; Chicago v. Robbins, 2 Black, 418; Robbins v. Chicago, 4 Wall. 657; Inhabitants of Woburn v. Henshaw, 101 Mass. 193; Lowell v. Short, 4 Cush. 275; Lowell v. Spaulding, 4 Cush. 277; Inhabitants of Milford v. Holbrook, 9 Allen. 17; Brooklyn v. Brooklyn R. Co. 47 N. Y. 475; Troy v. Troy, etc. R. Co. 49 N. Y. 657;; Gridley v. Bloomington, 68 Ill. 47; Durant v. Palmer, 29 N. J. Law, 544; Portland v. Richardson, 54 Me. 46; Inhabitants of Lowell v. Boston, etc. R. Co. 23 Pick. 24; Inhabitants of Stoughton v. Porter, 13 Allen 191.

In our opinion the decision of the district court is correct. It is therefore affirmed.

NOTE. See 4 Cent. L. J. 506.

CONTRACT — PART PERFORMANCE — ACTION.

McMILLAN v. MALLOY.

Supreme Court of Nebraska, March, 1880.

M agreed to thresh N's crop at forty cents an acre. Having threshed only one-third of the crop he refused to complete his contract, and after the time fixed for its completion, brought suit for his services. *Held*, that M was entitled to recover at the price fixed in the contract, less the damages sustained by N by reason of its breach.

Error from Saunders county.

E. T. Gray, for plaintiff; *Reese & Gilkerson*, for defendant.

MAXWELL, C. J., delivered the opinion of the court:

Malloy sued McMillan in the county court of Saunders county, and recovered the sum of $4.70 and costs. McMillan appealed to the district court, where judgment was rendered against him for the sum of $30 and costs. He brings the cause into this court by petition in error.

The petition of the plaintiff in the court below alleges: First, that there is a balance due him from the defendant of the sum of $4.60 for threshing grain in 1876. Second, that there is due him from the defendant the sum of $40.08 for threshing wheat in 1878. To this petition the defendant filed an answer in which he denied the facts stated in the first count of the petition; second, alleged that the threshing done in the year 1878 was done under contract between the plaintiff and defendant that the plaintiff should thresh all the defendant's grain for that year at forty cents per acre, and that plaintiff threshed about one-third of said grain and refused to complete his contract, whereby the defendant was damaged in the sum of $100; third, as a third defense the defendant alleged that the knuckles and points of tumbling-rods of the threshing-machine were not safely boxed and screwed, as required by law.

It is evident from the record that the jury rejected the item of $4.62, balance claimed to be due for the threshing of 1876. It appears from the testimony that in the month of September, 1878, the plaintiff entered into a contract with the defendant to thresh his grain raised that year for the sum of forty cents per acre, and that in pursuance of said contract the plaintiff threshed wheat for the defendant for three days, and had to quit work because the defendant was unable to obtain a sufficient number of hands to keep the machine in operation. The plaintiff threshed about 784 bushels of wheat, being about one-third of the defendant's grain, and which, at forty cents per acre, would amount to the sum of $17. There is some testimony tending to show that the plaintiff was to return and complete the job, although upon that point there is some conflict. The plaintiff, ignoring his contract, seeks to recover the value per bushel for threshing the wheat in question.

The court instructed the jury that, "if you find from the evidence that a contract for the threshing in 1878 was broken by the plaintiff, that fact will not prevent him from recovering for what he actually did, and you will allow him what it was reasonably worth, as shown by the evidence. But you will then proceed to ascertain how much, if any, damages the defendant McMillan sustained by reason of Malloy's failure to comply with the agreement, ascertain to whom the greater amount is due, deduct the less amount from the greater, and return your verdict for the balance." To which instruction the defendant excepted, and now assigns the giving the same for error.

The plaintiff in error insists that a recovery upon a *quantum meruit* can not be had upon part performance of an entire contract of this sort, when there is no reason for voluntary acceptance by the defendant. We are aware that there are a large number of cases, most of them tried in courts having no equity powers, holding that no recovery can be had in such cases. These decisions are placed upon the ground that the contract is entire, and that no recovery can be had on the contract until the plaintiff has performed his part of the same; and when a contract is entire and indivisible, and payment is to be made only after full performance, no action can be maintained on part performance. But when the contract is susceptible of division, and its entirety has been destroyed by part performance, from which the other party has derived a benefit, the law raises an implied promise to pay to the extent of the benefit received, and an action may be maintained thereon after the time has expired for the completion of the contract. In the leading case of Oxendale v. Wetherill, 17 E. C. L. 386, an action was brought to recover the price of 130 bushels of wheat sold and delivered by the plaintiff to the defendant at eight cents per bushel. The defendant proved that he made an absolute contract for 250 bushels, and contended that, as the plaintiff had not fully performed, he could not recover. It was held that the plaintiff having retained the 130 bushels, after the time for completing the contract had expired, was bound to pay for the same. In Bowker v. Hoyt, 18 Pick. 555, the plaintiff sold the defendant 1,000 bushels of corn, but delivered only 400 bushels. The court held, in substance, that the acceptance of a part of the corn was a severance of the entirety of the contract, and the defendant was bound to pay for the corn so delivered; but that he might reduce the plaintiff's claim by showing any damages he had sustained by the plaintiff's failure to fulfil his contract. 2 Smith's Lead. Cas. (6th ed.) 33; 2 Parsons on Contracts (5th ed.) 523-4. In Britton v. Turner, 6 N. H. 481, the plaintiff brought an action for work and labor performed by the plaintiff for the defendant from March 9, 1831, to December 27 of the same year. The defendant offered to prove that the work was done under a contract for one year for the sum of $100, and that the plaintiff left his service without his consent, and without good cause. Parker, J., in delivering the opinion of the court, after referring to certain cases where a recovery could be had, said: "Those cases are not to be distinguished in principle from the present unless it be in the circumstance that where the party has contracted to furnish the materials and do certain labor, as to build a house in a specified manner, if it is not done according to the contract the party for whom it is built may refuse to receive it—elect to take no benefit from what has been performed—and, therefore, if he does receive he shall be bound to pay the value; whereas, in a contract for labor merely, from day to day the party is receiving the benefit of the contract under an expectation that it will be fulfilled, and can not upon the breach of it have an election to refuse to receive what has been done and thus discharge himself from payment. But we think this difference in the nature of the contracts does not justify the application

of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day if the other party commences the performance, and with knowledge also that the other party may eventually fail of completing the entire term. If, under such circumstances, he actually receives a benefit from the labor performed over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he, perhaps, enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it as it is. * * * * It is said that in these cases, where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is that where there is a contract to labor from day to day for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed; and, although the other may not eventually do all he has contracted to do, there has been necessarily an acceptance of what has been done in pursuance of the contract." See Byerlee v. Mendel, 39 Iowa, 382; Pixler v. Nichols, 8 Iowa, 106. Other cases might be cited in authority of these views, but these are sufficient.

In some of the early English cases it was held that in actions for work and labor negligence or badness of materials constituted no defense to an action for the agreed price, but the party for whom the work was done must pay the stipulated price and resort to a cross-action to indemnify himself for a deficiency in the consideration. Browne v. Davis, cited in 7 East, 479; Templer v. McLachlan, 2 N. R. 136; 2 Smith's L. C. (6th Ed.) 34. The doctrine of recoupment in such cases seems to have had its origin at a later date than the cases cited. Basten v. Butter, 7 East, 479. These facts must be kept in view in considering the early decisions, and doubtless had considerable weight in the determination of the early cases. There is no difference in principle between the case of a vendee receiving and retaining a quantity of goods sold under an entire contract, after the vendor has refused to deliver the residue, and that of a party who has employed another to perform certain labor, but who, after performing a portion of the labor under the contract, rejects or refuses to perform the remainder. In neither case can an action be maintained on the original contract, but in both cases the party has received and appropriated what is done, and to the extent that he is benefited over and above the damage which has resulted from breach of the contract by the other party the law implies a promise to pay for such excess. Any other rule is fraught with gross injustice, and assumes that the party failing to perform is in all cases at fault, and offers an inducement to the opposing party, indirectly, to prevent a performance. But when a contract is shown to have existed, the measure of recovery for the services rendered is the price fixed in the contract, less the damages sustained by the employer by reason of the non-performance. Doolittle v. McCullough, 12 Ohio St. 360; Corwin v. Wallace, 17 Iowa, 374.

The court, therefore, erred in instructing the jury to allow what the work was reasonably worth. It is unnecessary to notice the other instructions. The defendant failed to prove such damages, even if the jury had found that the plaintiff had failed to so perform his contract as would entitle him to recover. There is a general allegation in the testimony of the defendant that he sustained $25 damages, but he fails to state a single fact that would entitle him to recover. The jury, therefore, were justified in rejecting his claim. As to the third cause of defense, there is no statement in the bill of exceptions as to what was proposed to be proved by the defendant. It is not sufficient to be available on error that the court sustains an objection to a question; the party must offer to prove certain facts, and, if they are excluded, embody the testimony thus offered in the bill of exceptions. There is no error, therefore, available to the defendant, in the third defense as set forth in the answer.

As it is clear from the record that the weight of testimony sustains the verdict of the jury, but as damages were assessed under the instructions of the court for the reasonable worth of the threshing, instead of the contract price, the plaintiff in the court below has leave to remit from the judgment the sum of $13 within thirty days from this date. And, upon condition that said *remittitur* is filed as above provided, the judgment of the district court is affirmed. In case of the failure of the plaintiff to remit from the judgment the sum specified above within the time designated, the judgment is reversed, and the cause remanded for future proceedings. The costs in this court to be taxed to the defendant in error.

NOTE.—See Duncan v. Baker, 7 Cent L. J. 488.

CONSTITUTIONAL LAW—POWER OF STATE TO SUPPRESS LOTTERIES.

STONE v. STATE.

Supreme Court of the United States, October Term, 1879.

In 1867, the State of Mississippi granted a charter to an association, under which the latter for a consideration was given the right for the term of twenty-five years to maintain a lottery. In 1868, the people adopted a new Constitution, which provided that lotteries should be illegal. *Held*, that the right granted in 1867 was thereby withdrawn. A legislature can not bargain away the police power of the State. Lotteries are the subject of that power. The contracts which the Federal Constitution protects are those which relate to property and not governmental rights. The right to stop a lottery is governmental.

In error to the Supreme Court of the State of Mississippi.

Mr. Chief Justice WAITE delivered the opinion of the court:

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. I., sec. 10. The doctrines of the Dartmouth College Case, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are.

In the present case, the question is whether the State of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract to permit "the Mississippi Agricultural, Educational and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions and sell and dispose of certificates of subscriptions which shall entitle the holder thereof to" "any lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable or useful," "awarded to them" "by the casting of lots, or by lot, chance or otherwise." There can be no dispute but that under this form of words the legislature of the State chartered a lottery company, having all the powers incident to such a corporation for twenty-five years, and that in consideration thereof the company paid into the State treasury $5,000 for the use of a university, and agreed to pay, and until the commencement of this suit, did pay an annual tax of $1,000 and "one-half of one per cent. on the amount of receipts derived from the sale of certificates or tickets." If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficieney of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way.

All agree that the legislature can not bargain away the police power of a State. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." Met. Bd. of Excise v. Barrie, 34 N. Y. 668; Boyd v. Alabama, 94 U. S. 650. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Patterson v. Kentucky, 97 U. S. 504; Beer Co. v. Massachusetts, *supra*. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes, but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in Phalen v. Virginia, 8 How. 168, that "experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor, and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now, but we very much fear that with the same opportunities of indulgence the same results would be manifested.

If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, can not admit of a doubt. When the government is untrammeled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who managed them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the provisional government of that State in 1867, at the close of the late civil war, the present act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new Constitution with a view to the resumption of their political rights as one of the United States, provided that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. XII., sec. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails

against them. Rev. Stat. sec. 3,894; 19 Stat. 90, sec. 2.

The question is, therefore, directly presented whether, in view of these facts, the legislature of a State can, by the charter of a lottery company defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it can not. No legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself. Beer Co. v. Massachusetts, *supra*.

In the Dartmouth College Case it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which to subserve those purposes ought to vary with varying circumstances" (p. 628); but Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629) "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of the government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government, as such taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power, but they can not give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations and give them, so to speak, a limited citizenship, but as citizens limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put, but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to stop them is governmental, and to be exercised at all times by those in power at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may take it back at any time the public good shall require, and this whether it be paid for or not. All one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to continue on the terms named for the specified time, unless sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record, and the judgment is consequently affirmed.

CONTRACT—ACCEPTANCE BY TELEGRAM — REVOCATION BEFORE RECEIPT OF ACCEPTANCE.

BYRNE v. VAN TIENHOVEN.

English High Court of Justice, Common Pleas Division, March, 1880.

1. The withdrawal of an offer, made and accepted by letters sent through the post, is inoperative if the notice of withdrawal does not reach the person accepting until after the letter of acceptance has been posted, unless authority has been given to notify a withdrawal by merely posting a letter.

2. The defendants, in Cardiff, on October 1st, by letter offered to sell to the plaintiffs in New York 1,000 boxes of

tin plates, subject to their reply by cable on or before the 15th of October; "terms four months banker's acceptances against shipping documents." The plaintiffs received the letter on the 11th of October, and the same day accepted it by cable. Meanwhile, on the 8th of October, the defendants wrote revoking their offer; and this letter reached the plaintiffs on the 20th of October. *Held*, that the revocation was inoperative, and the contract was complete on the 11th of October.

3. Though the acceptances sent by the plaintiffs were not bankers' acceptances as stipulated by the contract, yet, there being a continuing refusal on the part of the defendants to perform the contract, the plaintiffs were entitled to sue for its breach.

This was an action tried before Lindley, J., without a jury, at the Cardiff winter assizes, 1880, and reserved for further consideration.

B. T. Williams, *Q. C.* and *B. F. Williams*, for the plaintiffs; *M'Intyre*, *Q. C.* and *Hughes* for the defendants.

The facts and arguments sufficiently appear from the followiug judgment:

LINDLEY, J.

This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tin plates, pursuant to an alleged contract which I will refer to presently. The action was tried at Cardiff before myself without a jury, and it was agreed at the trial that in the event of the plaintiffs being entitled to damages, they should be £375. The defendants carried on business at Cardiff, and the plaintiffs at New York; and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on 1st Oct. 1879, and received by them on the 11th, and accepted by telegram and a letter sent to the defendants on 11th and 15th October respectively. These letters and telegrams, so far as material, were as follows: "1st October 1879.—From Leon Van Tienhoven and Co. to Messrs. Joseph Byrne and Co.—Dear Sirs.—We are duly in receipt of your favor of the 18th ult., and are glad to hear you admit our prices for tin plates to be moderate. We are well aware that most exporters deduct 4 per cent. in most instances from their invoices, but as we always make a rule to quote net we can not take off any extras from the prices we quoted; as you say that 'Hensol' is a favorite brand of yours, we will, although you certainly must know the present manufacturers' prices to be 17s. 6d. less 4 per cent. maintain our firm offer for 1000 boxes of this brand 14x20 at 15s. 6d. per box f. o. d. here, with 10 per cent. for our commission; terms four months bankers' acceptances on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here, and trust that this advantageous offer may be the commencement of repeated and satisfactory business between us." "Cablegram, 11th October.—From Joseph Byrne and Co., New York, to Messrs. Leon Van Tienhoven and Co., Cardiff.—Accept thousand Hensol." "15 October 1879.—Messrs. Leon Van Tienhoven and Co., Cardiff.—Dear Sirs.—We have to thank you for your valued letter under date of the 1st inst. which we had on Saturday, and immediately cabled acceptance of the 1000 boxes Hensol 1c 14–20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit, No. 2-8, October 13, on Messrs. A. R. M'Master and Bros., London, for £1000. This credit ranks A 1 with bankers. The bank has six million dollars capital. We appreciate your liberality in leaving this offer open so long with such a market as we are in, and it will not be our fault if we do not have considerable dealings to follow this, etc. Will thank you to ship the 1000 Hensols without delay, and without further to-day remain—Faithfully yours, Joseph Byrne and Co." These letters and telegrams would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writing within the statute of frauds, and that they contracted only as agents, but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action, which remain to be considered. First, they say that the offer made by their letter of the 1st October was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to this are as follows: On the 8th October the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. This letter, so far as material, was as follows: "8th October, 1879.—From Messrs. Leon Van Tienhoven and Co., Cardiff, to Messrs. Byrne and Co., New York.—Confirming our respects of the 1st inst., we hasten to inform you that, there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent., we are reluctantly compelled to withdraw any offers we have made to our constituents, and must therefore also consider our offer to you for 1,000 boxes Hensols, at 17*s.* 6*d.*, to be canceled from this date. —Yours faithfully, Leon Van Tienhoven and Co." This letter of the 8th October reached the plaintiffs on the 20th October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. This letter is followed by one from the defendants to the plaintiffs of the 25th October refusing to complete. There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. Routledge v. Grant, 4 Bing. 653.

For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent. 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent. It is curious that neither of these questions appears to have been actually decided in this country.

As regards the first question, I am aware that Pothier and some other writers of celebrity are of

opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind notified can not be regarded in dealings between man and man, and that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all. This is the view taken in the United States (see Taylor v. The Merchants' Fire Insurance Company, 9 How. S. 390, cited in Benjamin on Sales, pp. 56 and 58), and is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on the Principles of Contract, 2d, ed. p. 10, and by M. Leake in his Digest of the Law of Contracts, p, 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass therefore to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st October. The withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post the contract is completed the moment the letter accepting the offer is posted (Harris' Case, 26 L. T. N. S. 781; 7 Ch. App. 587; Dunlop v. Higgins, 1 H. of L. Cas. 381), even although it never reaches its destination. Household Fire Company v. Grant, 41 L. T. R. N. S. 298; 9 Cent. L. J. 89, 271, qualifying, if not overruling, British and American Telegraph Company v. Colson, 23 L. T. N. S. 868; L. R. 6 Exch. 108. When, however, these authorities are looked at it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it; but this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th October is to be treated as communicated to the plaintiffs on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th October of their offer of the 1st was inoperative, and a complete contract binding on both parties was entered into on the 11th October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn.

Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defense is that, as the plaintiffs never sent a banker's acceptance on London or Liverpool as stipulated in the contract, they can not maintain any action for its breach. The correspondence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment; and, although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I can not say that they did in fact send a banker's acceptance according to the contract. By the terms of the contract bankers acceptances on London and Liverpool were to be sent against —*i. e.*, were to be exchanged for—shipping documents; and if the defendants had been ready and willing to perform the contract on their part on receiving proper banker's acceptances, I should have been of opinion that the plaintiffs could not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this. It is true that the defendants in their letter of the 31st October say: "That even if we had not withdrawn our offer we would all the same have returned your credit;" and the defendants' solicitors, in their letter of the 26th November, say that, "if your clients (*i. e.* the plaintiffs) had fulfilled the terms of the contract at the outset the goods were ready to be shipped;" but the defendants' own letters of the 8th, 13th, and 25th October, show conclusively that this was not the case, and that the defendants stood on their notice of withdrawal, and would not have performed the contract even if banker's acceptances had been sent. Their letter of the 25th of October, in which they return the plaintiffs' first letter of credit, is explicit on this point. It runs thus: "We received your cable on the 20th inst., 'demand shipment;' and this day we are in possession of press copy of your letter of the 15th inst., inclosing duplicate credit from the agents of the Canadian Bank of Commerce upon Messrs. A. R. M'Master and Bro., authorizing the latter to accept our drafts at four-months' sight to the extent of £1,000 for payment of invoice cost of Hensol 1 C. coke tin plates at 15*s.* 6*d.* and 1 per cent. added f. o. b. Cardiff, dated 13th inst. Our offer of this parcel having been withdrawn by our letter of the 8th inst., we now return the above credit for

which we have no further need, but take the opportunity to observe that, in case of any future business proposals between us, we must request you to conform to our rules and principles which require banker's credit in this country," etc. The defendants do not return the letter of credit because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw from that letter is that, if the offer had not been withdrawn the defendants would not have returned the letter of credit, although in future transactions they might have been more particular. In the face of this refusal it was useless for the plaintiffs to send a banker's acceptance, and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position, or expressed any readiness to ship the goods on receiving a banker's acceptance; and it is plain to my mind that they were not prepared to do so. On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent banker's acceptances in exchange for shipping documents; and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper banker's acceptances.

It was contended that by pressing the defendants to perform their contract, the plaintiffs treated it as still subsisting, and could not treat the defendants as having broken it; and a passage in Mr. Benjamin's Book on Sales. p. 454, was referred to in support of this contention; but when the plaintiffs found the defendants were inflexible and would not perform the contract at all, they had in my opinion a right to treat it as at an end, and to bring an action for its breach. The passage in Mr. Benjamin's book is as follows: "But a mere assertion that the party will be unable or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end. The authorities will be found collected and considered in the notes to Cutter v. Powell, 2 Smith's Leading Cases, 1." It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin, viz., Avery v. Boden, 5 E. & B. 714, and others of that class, show that as the plaintiffs did not, when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs can not now treat the contract as broken at the time of such refusal. But I have found no authority to show that a continued refusal by the defendants to perform the contract can not be treated by the plaintiffs as a breach of it by the defendants. On the contrary Ripley v. McClure, 4 Exch. 345, and Cort v. Ambergate Railway Company, 17 Q. B. 127, show that the continued refusal by the defendants operated as a continued waiver of a tender of banker's acceptances and enable the plaintiffs to sustain this action. In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the defendants. It is sufficient to say that, whilst the plaintiffs were always ready and willing to perform the contract on their part, the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs.

For the reasons above stated, I give judgment for the plaintiffs for £375. and costs.

ABSTRACTS OF RECENT DECISIONS.

ENGLISH, IRISH AND CANADIAN CASES.

STOPPAGE IN TRANSITU—DURATION OF TRANSIT—EQUITY OF SUB-VENDEE.—In a case where a vendee of goods has sold to a sub-vendee, so long as the transit originally contemplated between the original vendor and vendee continues, the original unpaid vendor's right of stoppage *in transitu* remains, subject to the sub-vendee's equity to have the goods on paying for them.— *Ex parte Golding*. English Court of Appeal. 42 L. T. (N. S.) 270.

RAILROAD — NEGLIGENCE — TICKET ISSUED BY ANOTHER COMPANY — ACCIDENT AT OTHER COMPANY'S STATION—DUTY TO PROVIDE SAFE MEANS OF ALIGHTING.—Plaintiff took a return ticket at Richmond station on the S company's line, over which defendants had running powers. On his return journey plaintiff traveled in defendants' train, managed by defendants' servants. In alighting at Richmond station he was injured owing to the carriage, which was built to suit the stations on defendants' own line, being too high above the platform: *Held* (affirming the judgment of the Common Pleas Division), that defendants were bound to provide reasonably safe means of alighting, and that there was evidence to justify a verdict for plaintiff.—*Foulkes v. Metropolitan District R. Co.* English Court of Appeal. 42 L. T. (N. S.) 345.

LIBEL—NATURAL MEANING OF WORDS—INNUENDO—EVIDENCE IN SUPPORT OF INNUENDO—PRIVILEGE—MALICE.—1. The defendants published a circular referring to the plaintiffs in the following terms: "Messrs. H & Son hereby give notice that they will not receive in payment checks drawn on any of the branches of the C Bank." The plaintiffs sued the defendants for libel, alleging by way of innuendo, that the defendants meant thereby that the plaintiffs were not to be relied upon to meet checks drawn upon them, and were not to be trusted. *Held*, on motion for judgment, that the words used were capable of the meaning alleged in the innuendo. 2. *Semble*, the test is not so much what is in the mind of the person sending such a circular, but what is the result which it is likely to produce in the minds of those into whose hands it comes.—*Capital etc. Bank v. Henty*. English High Court, C. P. Div. 42 L. T. (N. S.) 314.

WILL—REVOCATION—TEARING — WITNESS — PRESERVATION OF PAPER TORN OFF.—1. No particular mode of tearing or excision can of itself establish an

intention to revoke a will; but the testator's acts must be considered in conjunction with all the surrounding circumstances, in order to determine whether the act done was done *animo revocandi*. 2. A duly executed will was found among the papers of the deceased. The signature of one of the attesting witnesses had been torn off, but the piece of paper containing the signature was folded up with the will, with a smaller piece cut from it. In other respects the will was entire. The court held that the will had not been torn *animo revocandi*, and admitted it to probate. *In re Wheeler.* English High Court, Pr. Div. 28 W. R. 476.

UNITED STATES SUPREME COURT.

October Term, 1879.

MUNICIPAL CORPORATION—OFFICERS EXCEEDING THEIR POWERS — INJUNCTION AT SUIT OF TAX PAYERS.—A municipal board having passed a resolution to purchase certain property from C as a site for a court house, and to issue bonds for its payment, received from C a deed and delivered to him the bonds in pursuance thereof. No provision was made by the board for the payment of the bonds beyond the general declaration that they should be paid out of the amount appropriated and limited for the next fiscal year. By the law then in force the fiscal year commenced on the first day of December of each year, and the expenditures of the board were restricted to the amount raised by tax for that year, unless by the spread of an epidemic or a contagious disease a greater expenditure should be required; and the amount to be raised was to be determined at a meeting of the board to be held prior to July 15th of each year. Some of the resident tax-payers were dissatisfied with this issue of bonds without making definite provision for their payment by taxation, and accordingly obtained from the Supreme Court of the State a writ of *certiorari* to review the proceedings of the board. The court adjudged the proceedings invalid, and set the same aside. Subsequently the bonds not having been returned or the land reconveyed, C brought an action in the United States Circuit Court to enforce their payment. In a suit by certain tax-payers of the county to enjoin that action: *Held*, that an injunction was proper. *Held, further*, that of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. — *Crompton v. Zabriskie.* Appeal from the Circuit Court of the United States for the District of New Jersey. Opinion by Mr. Justice FIELD. Decree affirmed.

DECREE FOR DEFAULT IN PAYMENT OF COUPONS —DEBT NOT A SUBJECT OF SET-OFF.—The United States having in 1871 obtained a decree in an equity suit against the N & C railroad, it was agreed between them and so provided in the decree that the bonds should be issued, on default in payment of any of whose coupons the United States should have a right to execute the decree by selling the road. Default having been made this was asked. Thereupon the appellant, the N & C railroad, asked that a debt which the United States owed it for transportation since the date of the decree might be applied to the payment and cancellation of the coupons in default and on file. The United States refused to make the application because of an alleged defense they had to the claim of the company. *Held*, that the court below properly declined to entertain the petition. The claim of the company does not arise out of the decree. There is no connection between the demand of the United States on the one side and that of the railroad on the other. The United States asks for no new decree, but execution because of default in the payment of an old one. Upon their application the only question is whether there has been default for the requisite time in the payment of the coupons filed. The dispute between the parties could not, even before final decree be made the subject of a cross-bill, because it does not grow out of the original suit. A cross-bill can not be used to bring in new and distinct matters. Rubber Co. v. Goodyear, 9 Wall. 809; Cross v. De Valle, 1 Wall. 14. Neither can the petition be treated as an original and independent suit, for the United States can not be sued on contracts except in the court of claims, If the United States had sued the railroad company on the coupons other questions might have arisen, but they do not do so.—*Nashville & Chattanooga R. Co. v. United States.* Appeal from the Circuit Court of the United States for the Middle District of Tennessee. Opinion by Mr. Chief Justice WAITE. Decree affirmed.

SUPREME COURT OF INDIANA.

May, 1880.

BANK CHECK—NOTICE OF DISHONOR.—Where one draws his check on a bank, having funds in the bank at the time, but withdraws the funds before the check is presented for payment, he is not entitled to notice of dishonor, for he could in no way be injured by the want of notice, his own act having caused the dishonor. Neither is he entitled to notice of the dishonor if he had no funds in the bank when he drew the check. Judgment reversed. Opinion by SCOTT, J.—*Fletcher v. Pierson.*

DECEDENTS' ESTATE — SALE BY ADMINISTRATOR TO HIMSELF. — If an administrator, by order of court, sells the lands of the deceased, as such administrator, to himself, as an individual, either directly or indirectly through a third person, he can not hold the title thereto against the heirs of the deceased if they took proper steps to avoid it. The question is not one of fraud in fact; such a sale is itself a fraud in law, or constructive fraud, which the law will not uphold, whatever may have been the motive in making it. The principle is founded on the doctrine of trusts, that a trustee can not sell the property he holds in trust to himself as an individual and profit thereby as against the *cestui que trust*. Judgment affirmed. Opinion by BIDDLE, J.—*Morgan v. Wattles.*

EXEMPTION UNDER ASSIGNMENT LAW.— The act of 1859 providing for voluntary assignment exempted to the debtor just the amount that was exempted from sale under execution, $300. The act of 1879 increases the exemption under execution sales to $600, and in accordance with the spirit and purpose of the act it should be held to equally enlarge by implication, the amount to be reserved to the debtor making an assignment under the act of 1859. This construction, however, can prevail only in cases and to the extent to which the act of 1879 is applicable—that is, to debts contracted after the taking effect thereof. Where there are prior and subsequent debts a just and practical application of the law should be made. Judgment reversed. Opinion by WORDEN, J.—*O'Neal v. Becker.*

SUPREME COURT OF TENNESSEE.

April Term, 1880.

DEVISAVIT VEL NON — JURISDICTION IN CHANCERY.—The chancery court has no jurisdiction to try an issue or to order an issue of *devisavit vel non*. The jurisdiction to try the validity of a will is vested solely in the circuit court. Opinion by FOLKES, J.—*Harrison v. Ginon.*

ADEMPTION OF LEGACY BY SUBSEQUENT GIFT.—A legacy of $5000 by will and subsequent gift of a valuable lot: *Held*, that on the face of the two transactions no presumption of ademption arose. Both gifts being in writing, the court does not decide whether parol proof could be introduced to show the purpose of satisfaction on the part of the testator; but conceding that it might be done such proof must be clear and satisfactory; and evidence of loose conversations, in which testator spoke of the gifts and a purpose to alter his will, or said that he was not able to give the legacy after the gift of the lot, is not such satisfactory evidence. Opinion by FREEMAN, J. — *Evans v. Beaumont.*

CONTRACTOR AND SUB-CONTRACTOR — EQUITIES UNDER FORFEITURE — RETAINED PERCENTAGE.—Under a contract between a contractor for the grading of a railroad and a sub-contractor, of a part of the same work, which stipulated for the retaining by the contractor of a certain percentage of the monthly estimates as collateral security for the execution of the contract, and provided, in the event the sub-contractor failed to keep a sufficient force at work to complete it in time, that the contractor might put a force on said work at his expense, or declare a forfeiture, and re-let or do the work, and hold the sub-contractor liable for any damage or injury by reason of his failure, and the sub-contractor left the work, and the contractor declared a forfeiture, but neither re-let nor did any further work, and by agreement with the railway company abandoned the work after receiving full pay for what had been done, it was *held* that the percentage retained belonged to the sub-contractor and was recoverable accordingly. Opinion by COOPER, J.—*Winters v. Fleece.*

MASTER'S REPORT OF SALE — SPEAKING EXCEPTIONS — MODIFICATION OF ORDER — LIEN CLAIMANTS.—1. Exceptions to a master's report of sale are inadmissible, which require the court to go behind or modify the decree under which the sale was made, or to look outside of the record on which it is based. 2. A decretal order will not be modified at a subsequent term by this court, upon grounds which might and should have been urged when the order was made; nor at all after it has been executed, unless in a very extraordinary case. 3. Mere inadequacy of price is no ground for setting aside a judicial sale. 4. It is no ground for interfering with a judicial sale, that the creditor in whose favor the sale is ordered, insists upon a prior title to the property, under which he claims, duly recorded and mentioned in the pleadings of the cause. Opinion by COOPER, J.—*Myers v. James.*

DECREE UPON DEMURRER — WHEN CONCLUSIVE SUPPLEMENTAL BILL— CERTIFICATE OF PRIVY EXAMINATION.—1. A decree upon a demurrer, if upon the merits, is as conclusive as though the facts set forth in the bill were admitted by the parties, or established by evidence, and is conclusive of everything necessarily determined thereby. But if the court merely decides that the complainant has not stated facts sufficient to constitute a cause of action, or that the bill is liable to a specific objection, such decision does not extend to any issue not before the court on the hearing of the demurrer. 2. Where, therefore, a bill to foreclose a mortgage of husband and wife on the wife's realty, making the mortgage an exhibit, was demurred to on the ground that the certificate of acknowledgment to the mortgage exhibited did not state that the clerk was "personally acquainted with the bargainers," or that the wife was "privately examined," and the demurrer was sustained as to the wife, after which the omissions in the certificate were corrected by the clerk, and an amended and supplemental bill was filed by leave of the court, upon the mortgage with the corrected certificate, setting out the proceedings under the previous bill, it was held that a demurrer to the latter bill was properly overruled. 3. The correction of the certificate of privy examination of a married woman, under the Code, sec. 2082, may be made by the officer who took the examination after he goes out of office, and the oath to the truth of the correction need only be made in open court without being entered on the minutes. Opinion by COOPER, J.—*Grotenkemper v. Carver.*

TRUSTEE AND CESTUI QUE TRUST —VOID EXERCISE OF POWER OF DIRECTION BY MINOR.—1. A deed in trust coveying real estate for the benefit of a female infant, to be held by the trustee during her natural life, provided that she might, by request, in writing to the trustee, have a sale made of the property for reinvestment, such writing to be acknowledged by her in form similar to the acknowlment of deeds. *Held*, that such a written request made and said to have been acknowledged by the *cestui que trust* when she was less than ten years of age, was void and might be repudiated by her, and that she might recover the property from an innocent purchaser. 2. An infant may exercise a naked power unaccompanied with any interest and not requiring the exercise of any discretion. But the exercise of power in the case stated required the exercise of discretion; and it would be a mere farce to charge a child of scarcely ten years of age with such exercise. Opinion by DEADERICK, C, J.—*Hill v. Clark.*

TAXES ON PROPERTY IN LITIGATION — WHEN PAID OUT OF RENTS.—In case of a bill filed to remove cloud from title, the defendant in possession failed to pay taxes, and complainant paid them until a receiver was appointed on petition of complainant. The bill was ultimately dismissed on hearing. *Held*, that complainant was entitled to be reimbursed the taxes paid by him, pending the litigation, out of rents in the hands of the receiver, on the principle that it was the duty of the court to have applied the funds to the payment of taxes, and that it would have done so had not complainant paid them. Opinion by FREEMAN, J.—*Wicks v. Sears.*

SUPREME COURT OF WISCONSIN.

May, 1880.

PROMISSORY NOTE — GUARANTY — STATUTE OF FRAUDS.— A written guaranty upon a negotiable promissory note, though referring to the note, and made at the same time with it, and constituting a ground of the credit given to the maker, is void by the statute of frauds, if it fails to express the consideration. Taylor v. Pratt. 3 Wis. 674, adhered to on the principle of *stare decisis*; and Houghton v. Ely, 26 Id. 181, distinguished. Affirmed. Opinion by COLE, J.—*Parry v. Spikes.*

SURETY—DUTY OF ONE TO WHOM PARTY MAKES INQUIRIES.—. If one who contemplates becoming surety to another for a third person applies to the person to whom the security is to be given for information as to the nature, extent and risk of the obligation, or the circumstance, condition or character of such third person, while the person so applied to may refuse to give such information, yet if he undertakes to give it he is bound to disclose every material fact within his knowledge affecting the proposed liability; and if he conceals any fact unknown to the proposed surety, which, if known, would have deterred him from becoming surety (where the latter has not the present means of ascertaining the fact, or where, though he has such means, artifice is used to mislead him or throw him off his guard), this is a fraud which will relieve the surety from his obligation. And this is especially so where the surety becomes such at the request of the person to whom the security is given. 2. An omission by the court of a correct qualification of a general principle of law stated in the charge, is not error, where such qualification is rendered inapplicable by facts shown by the undisputed evidence. Affirmed. Opinion by LYON, J.—*Remington Sewing Machine Co. v. Kezertee.*

FIRE INSURANCE—AGENT—STIPULATION—PRACTICE.—1. In an action upon a fire insurance policy, the answer was, that the policy contained a condition avoiding it, in case the interest of the assured in the property were other than the sole and unconditional ownership for his own benefit, if that fact were not represented to the insurer and expressed in the written part of the policy; that the property was held in trust by plaintiff for others, and he did not disclose the fact to defendant when he applied for insurance; and (as a separate defense) that he did not, in his proofs of loss, disclose such trust or the names of the persons beneficially interested as the terms of the policy required him to do before he could recover thereon: *Held*, that this was essentially a plea in bar, and not merely one in abatement, and there was no error in refusing to try first the question whether plaintiff had failed to make due proofs of loss. 2. Where the agent who issued the policy was previously informed of the circumstances under which plaintiff held title to the property, negotiated the contract of insurance with some of the persons beneficially interested (and not with the plaintiff, in whose name the policy was taken), was furnished with full information which would have enabled him, by inquiry, to learn the name of each beneficiary, and wrote the policy without specifying the trust, this was a waiver of the stipulation avoiding the policy unless such trust were written therein. 3. Under the practice in this State, plaintiff could make proof of the waiver, in his action on the policy, without first proceeding to have it reformed. 4. The policy provides that, "when personal property is damaged," the assured shall arrange "the various articles according to their kind, separating the damaged from the undamaged," and shall furnish the company an inventory "naming the quantity, quality and cost of each article." The property insured was one organ, and was wholly destroyed; and the assured, in his proofs of loss, stated the name of the article, its value just before the fire, and the amount of the loss (the sums named as such value and as the amount of loss being the same); and he refused to furnish on demand any further "schedule" under that provision, on the ground that in case of a total loss of a single article insured, no other "schedule" was required. *Held*, that the jury were warranted in finding a compliance with said provision of the policy. 5. The practice of granting a nonsuit upon the opening statement of the case by counsel for plaintiff, does not prevail in this State. Fisher v. Fisher, 5 Wis. 472. Affirmed. Opinion by LYON, J.—*Smith v. Commonwealth Ins. Co.*

NEGLIGENCE—RAILROADS—CONTRIBUTORY NEGLIGENCE—CATTLE GUARDS.—1. About half-past nine o'clock on a dark, rainy and snowy night, plaintiff went to defendant's depot at a village, for the purpose of taking the caboose car at the rear end of defendant's freight train, for his place of residence. The train stopped with the caboose car several rods north of the depot platform, and two car-lengths north of a cattle-guard, which was constructed across both tracks of the road and between them, and was partly uncovered. Plaintiff asked the night-watchman whether he would have to walk that far back to get on the caboose, and was answered affirmatively; and while on his way to the caboose met the conductor with a lantern accompanying lady passengers from the caboose; nothing was said to him by the conductor; and before plaintiff reached the caboose, he fell into the open cattle guard, and was injured. He had been in the habit of taking this train with the caboose standing north of the platform, but had never taken it with the caboose standing north of the cattle guard; and he had never noticed the situation and condition of the cattle guard, nor did he know before the accident that the caboose stood north of it. *Held*, that these facts warranted the jury in finding that defendant was guilty of negligence, and plaintiff free from contributory negligence. 2. The question whether the cattle guard was properly situated and constructed, is immaterial in such a case, defendant being chargeable with negligence on the facts stated, independently of that question. 3. In an action for injuries from negligence, where proper instructions have been given, and there is a general verdict for the plaintiff, the jury must be presumed to have passed upon both the question of defendant's negligence, and that of plaintiff's contributory negligence. 4. There was no error in refusing to charge that plaintiff, if informed that the train would not be hauled up to the platform to allow him to get on, "had no right to take another way of getting on, and put himself in peril," and that if he did so and was hurt, he could not recover. 5. The court gave the above instruction modified by adding, "if you find that he put himself in such peril." *Held*, that this must be understood as meaning, "if you find that he knowingly put himself in such peril;" and in this there was no error against defendant. 6. In a civil action, the evidence is not required to be such as establishes beyond a doubt the facts relied upon for a recovery. Opinion by ORTON, J.—*Hartwig v. Chicago etc. R. Co.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

43. A forecloses mortgage against B and does not make C, a subsequent judgment creditor, a party. A's judgment was for $3,000. He bid in the property for $2,000. The year for redemption expires, and A takes deed under which he now occupies the premises. C, five years having expired, issues execution on his judgment, bids in the property and brings bill to redeem. How much must he pay A? Is it the amount of his bid with interest, etc., or must he pay the full amount of the lien as first taken? Was the balance of A's judgment merged in his deed? A.

CURRENT TOPICS.

The Cole disbarment case at Des Moines, Iowa, last week, came to a sudden and unexpected termination. The case being called before Mr. Justice Miller and Judge McCrary, the respondent's counsel asked to withdraw the original answer and to substitute a new one. The new answer was then filed and read, and was in these words:

"United States Circuit Court, District of Iowa. *Ex parte* Cole.

"Now comes C. C. Cole, respondent herein, and withdrawing the answer heretofore filed to the original charges, answers now to said charges that he admits the writing of the said several matters charged in the first and second parts of said information, but says they were written in the zeal and anxiety of an attorney for his client.

"That respondent does not believe and never did the truth of the charges made by his client against the integrity of this court or of either of its judges. Nor does he believe the truth of any charges in any of said letters in said information referred to, or in any publications over the signature of this respondent in the *Daily Register* in November and December, 1878, impeaching the integrity of said court or any of its judges. Respondent admits that he did sign on the —— day of ——1877, in good faith, and without coercion, the card in vindication of the court.

"Respondent admits the wrong he himself has done the court and the judges thereof in his said letters and in the publications in newspapers aforesaid and in pamphlets; and this respondent withdraws and retracts unqualifiedly every statement in the said letters and publications made by this respondent which reflected upon the integrity of the court or either of its judges, and hereby expresses his sincere regret that said letters or publications were ever written or made.

"And this respondent hereby declares his belief in the integrity and purity of purpose of the said court and each of its judges in all their rulings and judicial actions in the said suit against the Central Railway of Iowa, and he makes this acknowledgment as an act of justice to said judges, and desires the same to be placed upon record as a complete vindication in respect to all matters and charges reflecting upon them in said letters and publications made by this respondent.

"And respondent making this full acknowledgment and hereby expressing his sincere regret for said letters and publications, he pleads in extenuation the circumstances under which he was placed, and he now asks the forbearance of this court and submits himself to its judgment.

"(Signed) C. C. COLE."

"F. W. LEHMAN,
"A. B. CUMMINS,
Of Counsel."

It was to clear the skirts of Judge Dillon and his colleague that the prosecution was undertaken and carried on by the Bar Association of Iowa. This has now been done. Judge Dillon's vindication from the mouths of his enemies was long delayed, but it has come at last. And it remains as complete and final as the confession of his accuser is disgraceful and humiliating.

What is or is not *per se* a public nuisance is frequently a question of much difficulty. It is not surprising then that even in Pennsylvania a difference of opinion should arise as to whether a liberty pole in a public street can be regarded in law as in itself a nuisance. In *City of Allegheny v. Zimmerman*, 10 Pitts. L. J. 168, a liberty pole erected in a public street by a number of citizens was blown down in a gale, and a boy injured. The Supreme Court, two judges dissenting, ruled that the erection could not be held to be a nuisance *per se*. The court, in rendering judgment, gave a somewhat interesting historical description of the liberty pole. "Their erection appears to have been almost coeval with the birth of our nation. As the name imports, they were erected to symbolize our liberties, and as a mode of proclaiming that we had thrown off all allegiance to the government of Great Britain. At first they appear to have been used as expressive of concurrence in the principles embodied in the Declaration of Independence. As time passed on they began to be erected by each political party of the country to express its greater devotion to the rights of the people. As the object of their erection was patriotic, and with a view of inciting a spirit calculated to advance the public welfare, they were placed on highways and public squares. The people so desired it. The municipal authorities assented to it. It is a custom sanctioned by a hundred years, and interwoven with the traditions, memories and conceded rights of a free people. Unless forbidden by the authorities it has been considered the exercise of a lawful license incident to citizenship. Hence in this case no permission was asked of the authorities for leave to erect the pole, and no objection was made by them. The travel on the street where it stood was merely local. It did not occupy the street to such an extent or in such a manner that any person complained of its interfering with the public travel. To all appearances the pole was strong and sound. No doubt existed as to its strength. In the view taken by the court below it mattered not if all these facts were proved; and further that it was well secured; that no person had reason to apprehend any danger in its remaining there and that it yielded only to the severe gale, yet having broken, the city was liable for the injury sustained by the defendant in error. If it has been a uniform custom for the people to erect such poles in the streets of the city from its earliest history, under the implied assent of the municipal authorities, and if this one was so carefully erected, having due regard to the material of which it was formed, and the manner in which it was secured, that a careful and prudent person would have apprehended no danger therefrom, we think it was not a nuisance *per se*. It is therefore a question for the jury whether it was erected in such a place and manner, and maintained for so long a time, under all the circumstances, as to have created reasonable apprehension of danger."

CORRESPONDENCE.

DEGREES OF MURDER—STATE V. CURTIS.

To the Editor of the Central Law Journal:

The note to *State v. Curtis*, published in the CENTRAL LAW JOURNAL of May 7, 1880, is well calculated to mislead, and inaugurate an erroneous practice in like cases hereafter. The writer seems to have misconceived the practical bearings of the case entirely, as well as the position of the court in other cases; and if his views of the proper meaning of the case are to prevail with the profession and the trial courts, it is plainly evident that the Supreme Court will not stand by them, and much confusion will follow.

The idea seems to have gained currency that the

Curtis Case, and some others decided at the same term, were designed to inaugurate a new departure on the subject of murder in the second degree. Just what that departure is, in practical effect, is not made apparent. Certainly the court could not have intended to depart from the Wieners' Case; for that case is cited and relied on in the Curtis Case, and is constantly referred to by the court in other cases without the slightest dissent. And the same is true of other cases bearing on this subject. It can not be true, then, as charged, that the court, "quietly ignores all the former adjudications upon the subject," with the design of interpreting the statute anew. The complaint seems to be, that the word *premeditatedly*, as used in the statutory classification of murder in the first degree, is regarded as a practical substitute for *aforethought*, as used in the common law definition of murder. The court say: "Malice aforethought is usually defined in defining premeditation and malice." Again: "There is no murder in the second degree under our statute without premeditation." Again: "In the case at bar, premeditation is not defined, nor is the term *malice aforethought* defined." Now, as there can be no murder at all under the statute without malice aforethought, that being a necessary ingredient at common law, and as premeditation and malice are usually defined in the same language as malice aforethough, it is difficult to see wherein the court has made a substantial departure from previous adjudications. It had already been determined in the Wieners' Case, and perhaps others, that "deliberate" and "premeditated" are not synonymous. The real objection to the fourth instruction in the Curtis Case seems to have been, that while it withheld the idea of premeditation entirely from the consideration of the jury, it also failed to define malice aforethought which would necessarily have included what the court understands the word premeditated to mean. If we accept the explanation of the court as to the meaning ascribed to the words premeditated and aforethought, which is that "they mean that the *act which the party is prompted by his malice to commit* should be *premeditated* or thought of beforehand," and apply this rule to the facts of a case constituting murder in the second degree, it will be found that, "constructive malice or implied intention as an element in murder," is not ignored, and was not intended to be ignored by anything appearing in the case. And, again, in its classification of intentional homicides, the court say: "Nor can any homicide be murder in the second degree, *unless the act causing death* was committed with malice aforethought, that is, with malice and premeditation," which, being applied to the cases commonly put to illustrate murder in the second degree under the statute, clearly recognizes the doctrine of "constructive malice or implied intention." If these views are correct, it is evident that too much has been made of the Curtis Case.

The tautology produced by rendering the statute with "aforethought" substituted for premeditated, and malice aforethought inserted, is not satisfactory as an *expose*, because like use may be made of other essential words with nearly the same effect.

"The assignment of an *intentional homicide* to manslaughter in the fourth degree" is denounced as "unreasonable and absurd," and in so doing it is asserted that the Supreme Court has "utterly misconceived the true interpretation of the statute." Some one is radically wrong in this regard. Who is it? R. S. § 1250, reads: "Every other killing of a human being by the act, procurement or culpable negligence of another, *which would be manslaughter at the common law*, and which is not *excusable or justifiable*, or is not *declared in this chapter to be manslaughter in some other degree*, shall be deemed manslaughter in the *fourth degree*." The legislature must have had in mind some killing which was *manslaughter at the common law*, and which the statute does not declare to be *excusable or justifiable*, or *manslaughter in some other degree*; and if a case of this description can be pointed out, which was an *intentional homicide* at common law, it must fall within this section however "unreasonable and absurd" it may seem. The fault is rather with the *statute* than the *court*. In the case of State v. Edwards, decided at the October term, 1879, the court say: "It is well known, and it has been heretofore stated by this court, that there are inexcusable and unjustifiable homicides, intentionally committed, which at common law amounted only to manslaughter. State v. Bransleter, 65 Mo. 149: State v. Wieners, 66 Mo. 13. If a husband find his wife in the act of adultery, and provoked by the wrong instantly takes her life, or that of the adulterer; or if a father detect one in the commission of the crime against nature with his son, and immediately avenges the wrong by the death of the wrong-doer, the homicide is only manslaughter. So any assault made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the killing to manslaughter." The intentional killing of another without malice, on sudden quarrel, or in heat of passion, was manslaughter. 1 East's Pleas of the Crown, 233, 234, 235; 4 Bl. Com. 191; 2 Bish. Crim. Law, §§ 676, 695, 708; Whart. Hom. § 5; State v. Stan, 38 Mo. 270, 277; State v. Holme, 54 Mo. 165-6. In State v. Curtis, it is said that whether homicides of this nature are manslaughter in the second degree or the fourth degree will depend upon whether the facts bring the killing within § 1243 or § 1250 of the statute. The court has pointed out intentional homicides that may fall within § 1250, and the annotator would better serve the profession by pointing out the class of homicides that were intended by that section, and showing that it does not include any *intentional homicide* which was only manslaughter at common law, than by a general denunciation of the court for not understanding the statute.

C. * *.

Jefferson City, Mo.

RECENT LEGAL LITERATURE.

RECENT REPORTS.

The sixty-ninth volume of the Missouri Reports embraces a portion of the cases decided at the October term of 1878, and the April term of last year. All the important ones have, we believe, in one way or another appeared in this JOURNAL. In their official form they are presented in the best style—the *syllabi* carefully prepared, the statements of fact, whenever necessary from the paucity of the opinion, concise and complete, the arguments of counsel given only where specially valuable, the citations verified, the proof

Reports of Cases Argued and Determined in the Supreme Court of the State of Missouri. Thomas K. Skinker, State Reporter. Vol. 69. Kansas City: Ramsey, Millett & Hudson. 1880.

Reports of Cases Decided in the Supreme Court of the State of Oregon. January Term, 1879. C. B. Bellinger, Reporter. Vol. 7. San Francisco: A. L. Bancroft & Co. 1880.

faithfully read. The type and paper, as we have become accustomed to them under the new order of things, are both excellent. Mr. Skinker may very well be proud of this volume, which is a credit both to himself and to the State. It contains, together with the index and table of cases, 770 pages of text.

The seventh volume of the Oregon Reports is a smaller book, falling under 600 pages, including both index and table of cases. The decisions here reported were all rendered at the January term of 1879, and number in all but sixty. Among them we note the following: A testatrix prior to making her will, accompanied the legatee, her daughter, to a spiritualistic seance, where a pretended letter was read from her deceased husband, warning her against her son, and advising her to "fix" her property so that he could not get it. *Held*, that this was undue influence and went to impeach the will. *Greenwood v. Cline*, p. 17. The unwritten law of a foreign country must be shown by the oral testimony of witnesses skilled therein and the published reports of the decisions of such country and not by historical works. *State v. Moy Looke*, p. 55. A lease is not a "conveyance" within the meaning of that word in a statute. *Edwards v. Perkins*, p. 149. In an action for seduction it is competent for the plaintiff to prove the good character of his own family, and also the good character and standing of the defendant's family. "It was competent for the respondent to show that while it was his duty to be watchful over the morals of his daughter, he was nevertheless justified in permitting that degree of social intimacy between her and the appellant which is always allowable between the different sexes in good families, but which would not have been tolerated had he belonged to a family which was low or degraded." *Parker v. Monteith*, p. 277.

"The Constitution of the United States. Three Lectures delivered before the University Law School of Washington, D. C., by Mr. Associate Justice Miller of the Supreme Court. Feb. 6th, 12th, 19th, 1880," is the title of a small pamphlet of eighty-eight pages just issued by W. H. and O. H. Morrison, Washington, D. C. The lectures were delivered before a law class in a colloquial way suited to the audience, and were stenographically reported. Their style, for this reason, will be found to be especially popular and attractive, and such as to interest as well as instruct all classes of citizens. We venture the assertion that there can be found nowhere else in so small a compass a statement so clear, terse and vigorous of the principles by which our great charter is to be construed, and the powers of the National Government ascertained and defined. The subject is one of interest not alone to the members of the legal profession. It is of special interest to citizens in general. Whatever Mr. Justice Miller says upon any subject is worth reading. What he says in these lectures about the Constitution of our country, the powers and duties of the several departments of the Government, and of Congress, the rights of citizens and other kindred subjects, is well worthy of general attention. These should be read,—and not only read but studied—by all classes of citizens.——Hon. John F. Kelley has opportunely issued an appendix to his work on Criminal Law and Practice, in which the changes made in the criminal law of this State by the Revision of 1879 are shown. It will be a necessity to every criminal lawyer in Missouri.——Among the articles of peculiar interest in the *North American Review* for June is a paper on Divorces in New England, by Dr. Nathan Allen, from which it appears that divorce is on the increase, in these States at least. In 1860, the ratio of divorces to marriages was in Massachusetts 1 to 50; in Vermont 1 to 22; in Connecticut 1 to 14. In 1868 the divorces had obtained the following higher ratio: Massachusetts 1 to 21; Vermont, 1 to 14; Connecticut 1 to 10. The writer finds that the number and causes of divorce vary greatly in different localities; adultery and desertion prevail more in cities than in the country. The husband is the complainant in only one-third of the cases, and the proportion in which the wife is the petitioner is steadily increasing. One half the divorces are obtained within eight or ten years after marriage.

NOTES.

——More litigious than Mr. Boythorn was Dr. Wagner, of Woodsboro, Md., who was indicted the other day for being a "common barrator." Such a charge is somewhat unusual, though the law books do define the crime itself. On the trial it was found that there were but half a dozen instances of such a charge in as many hundred years. The State charged that the defendant had brought innumerable actions against at least fifty different persons in the county upon purely fictitious causes of action. One day before a single magistrate he had instituted nearly 1,000 suits, as many as 126 being against one person, 121 against another, and 120 against a third. But it appeared that these suits were brought by the doctor himself in his own name. The defense argued that when the prisoner was himself the litigant, if his suits were groundless and malicious, the law supplied a sufficient remedy by mulcting him in costs and rendering him also liable to action for malicious prosecution; that the law did not intend to make it an indictable offense, except when the offender attempted to escape all civil liability by inciting others to bring suits instead of bringing them himself. The court took the subject under advisement, and afterwards announced its decision to be in Wagner's favor, and ordered the discharge of the prisoner. Abbott (Law Dict.) says: "Nor will any number of false and groundless actions brought by a man in his own right amount to the offense. The habitual moving others to quarrels or suits is essential."

——"The contract with the grantors of the (fire) policies," said the Master of the Rolls, in North British and Mercantile Insurance Company v. London, Liverpool and Globe Insurance Company, L. R. 5 Ch. D. 576, "is a contract of indemnity, and indemnity only. It is to indemnify R. & Co. against loss by fire." And the Court of Appeal in that case held that if the assured, having a right to obtain indemnity from a third person, came upon the insurance company, the latter were entitled to be subrogated in the place of the assured. One result of the application of this doctrine does not seem to have been understood until it was pointed out by the Court of Appeal on Wednesday last. If a landlord insures his premises, and a fire occurs, and the premises are rebuilt or reinstated by the tenant before any claim is made on the policy, the landlord can not recover anything from the insurance company. And if after the landlord has received the insurance money the tenant rebuilds or reinstates the premises, the insurance company can recover back the insurance monies from the landlord, either by the old common law action for money had and received—the actual sum of money paid upon a condition that a person had sustained loss, and no loss had been sustained—or equitably on the ground that the assured had been indemnified by the insurance company, and the insurance company had a claim to be subrogated in the place of the assured.

ST. LOUIS, JUNE 4, 1880.—No. 1.

The design of this *addendum* (undertaken at the request of a number of our subscribers of this State) is to present to the Bar of Indiana complete abstracts of every opinion filed in the Supreme Court of Indiana from now forward. The fact that the CENTRAL LAW JOURNAL is devoted to the decisions of all the States, renders it impossible for us to occupy any portion of it with cases of mere local interest. But the necessity of the profession being kept informed concerning what the Appellate Courts are doing, and the length of time which elapses between the filing of an opinion and its appearance in the official reports, offer a sufficient justification for this venture. The lawyers of Indiana may rely upon obtaining hereafter in these columns information as to the decision of every case determined by the Supreme Court of the State. Other matters of interest to the bar of the State will also appear when the space allows. The abstracts will be printed within the shortest time possible after the opinions are filed. No case, however unimportant, will be omitted.

The price of this *addendum* will be $1 a year. Subscribers who have already paid their subscriptions may obtain it for the balance of this year by remitting 60 cents. Remittances may be made in 3, 5 or 10 cent postage stamps.

THE ADDENDUM WILL BE SENT AT THIS PRICE TO SUBSCRIBERS OF THE CENTRAL LAW JOURNAL ONLY.

Address

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SUPREME COURT OF INDIANA.

May Term, 1880.

PRACTICE—NEW TRIAL — SMALLNESS OF DAMAGES.—I. Where a party reserves an exception to the ruling of a court granting a new trial he does not waive his right to take advantage of error in granting such new trial by appearing to the case on the second trial. 2. In an action by a father against a druggist for causing the death of his child by filling a prescription with morphine instead of quinine: *Held*, that the child might, if he had lived, have maintained his action for damages for the injury done his person, but would not, under the statute, have been entitled to a new trial on account of the smallness of the damages awarded him by the jury; and as the father stands in the place of the child as to the right of action in the event of the child's death, he is not entitled to a new trial under similar circumstances. The father can maintain the action only as the representative of his child's right, Code, §§ 353, 782, 783, 784; 57 Ind. 297; 39 Ind. 501. Affirmed. Opinion by BIDDLE, C. J.—*Gann v. Worman.*

PRACTICE—RIGHT OF PLAINTIFF TO DISMISS HIS ACTION.—In this case after the evidence was heard the court intimated that there was not evidence to sustain some of the material allegations of the complaint, and thereupon the plaintiff requested the court to make a special finding of facts, which the court consented to do. Afterwards, on the same day and before any further proceedings in the cause, the plaintiff filed a written dismissal of his action, and asked leave to dismiss his action without prejudice, which the court refused to give him permission to do. About three days afterwards the court made a special finding of the facts and rendered judgment thereon. *Held*, that the court erred in denying the right of the plaintiff to dismiss his action. No actual finding had been made at the time the plaintiff asked leave to dismiss, and if the court intended its intimation in regard to the insufficiency of the evidence as an announcement of its finding, such announcement was withdrawn by its subsequent agreement to make a special finding of the facts. The statute gives the plaintiff a right to dismiss without prejudice at any time before the finding of the court is announced. 2 Rev. Stat. 184, sec. 363. Reversed. Opinion by NIBLACK, J.—*Beard v. Bicker.*

EVIDENCE—UNEXECUTED CONTRACT—DILIGENCE IN OBTAINING WITNESSES.—1. In an action to recover for work and labor done and materials furnished in building a house, it is not error to refuse to allow the defendant to offer in evidence a paper purporting to be a contract, and shown to have been drawn by an attorney at the request of the plaintiff, but not signed by either plaintiff or defendant. 2. In such an action the defendant filed a counter-claim for damages, alleging that the work had not been done in a workmanlike manner. The suit was commenced on March 9, 1877, and was tried on the 31st of the same month. On April 9, 1877, after the verdict was returned for the plaintiff, the defendant procured two persons to examine the house, who filed affidavits that certain parts of the work were not done in a workmanlike manner. These persons had been witnesses on the trial, and they stated in their affidavits that the defects mentioned were unknown to them when they testified at the trial. These affidavits were made part of a motion for a new trial, but there was no affidavit of the defendant filed with the motion. *Held*, that no sufficient diligence was shown in procuring evidence. Affirmed. Opinion by SCOTT, J.—*Lewis v. Crow.*

CONTRACT—PREVENTING PERFORMANCE OF—RIGHT OF RECOVERY.—This was an action upon the following instrument of writing: "November 26, 1873. Due Robert Johnson, David Weaver and John W. King three hundred dollars, provided Elizabeth King does not appear at the January term of the court if she be able; and when she appears at said court this is null and void. Augustin M. King." The complaint alleged that at the time the note was given, the said Elizabeth King was under indictment and that the note had been given by Augustin M. King on the agreement of appellees, who were the bail of the

said Elizabeth, that they would not arrest her upon a bail-piece and surrender her to the sheriff, etc., and that she did not appear at the January term, etc. Appellant answered admitting the execution of the note but averring that he was the husband of the said Elizabeth, but that at the time of her arrest she was living a wandering and lewd life, and that appellee and her other sureties went on her bail on account of their unlawful intercourse with her; that they represented to him that they were fearful she would flee the country and that if appellant would give them the instrument in suit, they would not surrender, but would remain as her sureties and use all their power over her to get her to remain and plead to said charge; that appellee did not try to get her to remain and answer the charge, but procured her a e purpose of shielding her from punishment and rendering appellant liable upon said instrument. A demurrer to this answer was sustained. *Held*, that the court erred in sustaining the demurrer. It is an elementary rule, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. Broom's Leg. Max., 195. If the performance of the condition in the instrument in suit was prevented by the payees of said note by sending the said Elizabeth out of the country and procuring her absence, no rule of law or equity would enable them to enforce the instrument against appellant. 45 Ind. 183; 49 Ind. 275; 51 Ind. 426. Reversed. Opinion by HOWK, J.—*King v. King*.

PURCHASE OF REAL ESTATE—RESULTING TRUST—STATUTE OF FRAUDS. This was an action for partition, the complaint alleging that in 1860, the plaintiff then being twenty-one years old, the defendant, his father, told plaintiff that he wished to purchase a certain piece of land if plaintiff would help him to pay for it and take part of the land; that plaintiff being about to leave his father's house, in consideration of receiving one-half of said land, stayed and accepted said proposition and contributed a certain amount of wheat and worked for his father three years; that in 1862, with the means acquired by their joint labor, in pursuance of said agreement they jointly purchased said land, it being agreed that the three years' labor performed by plaintiff should entitle him to one-half of said land; that by agreement the deed was taken in the father's name; that after the purchase the plaintiff farmed part of said land and finally went into possession thereof in 1863 and has had open and undisputed possession ever since; that plaintiff had made permanent improvements worth a certain amount on said land; that plaintiff and defendant had farmed said land in partnership ever since plaintiff went into possession, the plaintiff doing the work, furnishing everything and giving defendant one-third of the products; that defendant was threatening to sell the land and dispossess plaintiff. Wherefore, etc., *Held*, that the complaint was insufficient. It does not show that plaintiff furnished any part of the purchase money and hence no trust resulted in his favor. It must be assumed that the contract was not in writing, as no copy thereof was filed with the complaint, and it is not sufficiently shown that possession was delivered and taken under the contract in order to take it out of the statute of frauds. In order that possession may take such a case out of the statute, it must appear that such possession was taken under, and by virtue of the contract and with the knowledge and consent of the vendor. 45 Ind. 487; 43 Ind. 18; 67 Ind. 12. The contract must provide either expressly or by implication, that the purchaser shall be entitled to the possession which is thus taken. Reversed. Opinion by WORDEN J.—*Neal v. Neal*.

PROMISSORY NOTE—NEGLIGENCE IN EXECUTION—INNOCENT HOLDER.—In order to exonerate a party, as between himself and the innocent holder, where his signature to a negotiable note has been obtained by fraud, it must be shown that he was guilty of no negligence in affixing his name to the note or in not ascertaining the character of the instrument signed by him. And an averment in an answer to a complaint on such a note, that the maker could neither read nor write the English language and did not know the character of the paper, without averring that he either desired or requested that the paper he signed should be read to him, or that any one pretending to read it to him had not read it correctly, nor alleging that some advantage had been taken of him by reason of his inability to read or write the English language, nor showing that he took any prudent means to ascertain the true character of the paper he was called on to sign, is insufficient. Such an answer does not show due diligence. 48 Ind. 436; 49 Ind. 500. Reversed. Opinion by NIBLACK, J.—*Fisher v. Von Behren*.

JUDICIAL SALE—DEFECTIVE DESCRIPTION OF LAND IN JUDGMENT—VALIDITY OF DEED.—This was an action to quiet the title to real estate. Appellants executed a mortgage upon certain lands stated in the mortgage to be in Morgan county. The mortgage was duly foreclosed in the Morgan circuit court, and the mortgaged premises sold by the sheriff to appellees. In the judgment of foreclosure the land mortgaged is correctly described as to section, township and range, but it is not said to be in Morgan county, Indiana, though it is said in the sheriff's deed to be in that county. It is claimed by appellant that the failure to show in the judgment and foreclosure in what county and State the land was situate, vitiated the sale. *Held*, that the mortgage was part of the record in the foreclosure suit. This showed the land to be in Morgan county; and while the judgment did not, the entire record did show the land to be in that county. It would seem that the entire record might be referred to for the purpose of showing that the land was situate in that county. In addition to the above, the courts take judicial knowledge of the public survey of the State, and therefore that land corresponding with that described in the judgment of foreclosure lies in Morgan county, Indiana, and in no other county. As the Morgan circuit court entered the judgment of foreclosure, it will be presumed that the land mentioned in the judgment was the land in Morgan county bearing the same description. If not in Morgan county the court would have had no jurisdiction to enter the judgment of foreclosure; and the presumption is in favor of the jurisdiction of the court. 9 Ind. 394; 17 Ind. 6; 25 Ind. 380; 46 Ind. 96. By presumption of law, therefore, the sheriff's deed, even if it had not specified the county or State in which the land was situate, it being based upon a judgment of foreclosure rendered in Morgan county, would be considered as having referred to the land in that county bearing the description mentioned in the judgment of foreclosure and deed. This court can not try the correctness of a record on affidavit, but must take it as correct as it comes up under the hand and seal of the court below. If it is wrong the remedy of the complaining party is to have it corrected in the court below, and the corrected record may be sent up on *certiorari*. Affirmed. Opinion by WORDEN, J.—*Burton v. Ferguson*.

Fletcher v. Pierson, see 10 Cent. L, J. 455.

Morgan v. Wattles, see 10 Cent. 455.

O'Neal v. Becker, see 10 Cent. L. J. 455.